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IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
*Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
*Respondent.*

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
*Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
*Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### QUESTIONS PRESENTED

1. Whether it is unlawful price-fixing under Section 1 of the Sherman Act for a nationwide group of otherwise competing sellers to agree to have a sales committee market their products at prices fixed by that committee.

2. Whether such conduct constitutes copyright misuse where the products in question consist of performance rights to copyrighted music.

The Court of Appeals for the Second Circuit answered both questions in the affirmative. For the reasons set forth below (principally that those rulings were clearly correct and fully in conformance with this Court's prior price-fixing decisions), we believe neither question requires or warrants the grant of these petitions. But if writs of *certiorari* were to be issued to review those questions, we would also urge, as additional grounds to support an affirmance, affirmative responses to the following questions which are germane to the totality of defendants' conduct and incorrectly decided by the district and circuit courts:

3. Whether the combination described above is guilty of monopolization under Section 2 of the Sherman Act where (a) the sole license the committee offers to users is a blanket license to the entire pool of its members' copyrighted musical compositions, under which the user pays a fixed dollar fee or a percentage of its income; (b) any attempt by a user to surmount the barriers to dealing directly with the members of the combination is a course of conduct that threatens the user with appreciable competitive disadvantage and loss; and (c) those barriers are artificial in the sense that they have arisen as a result of the existence of the combination and may be removed by court decree.

4. Whether the combination described above is guilty of tying under Section 1 of the Sherman Act and copyright misuse under this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

## STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is quoted in the petitions. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."



Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . ."

## STATEMENT OF THE CASE

### A. Facts

Writers of musical compositions ordinarily assign the copyrights to their works to music publishing corporations, pursuant to contracts under which the publishers agree to promote and commercially exploit the songs and divide the royalties with the writers (Pet. A. 9a n.13*). In most fields of exploitation—such as the licensing of publishing rights to sheet music companies, mechanical rights to phonograph record companies, and performance rights to motion picture production companies—music publishing corporations deal directly with their customers (Pet. A. 67a-68a), and those markets are characterized by price competition

*"Pet. A." citations refer to pages of petitioners' appendices, which are identical.

among individual compositions and thus the publishers themselves.

The licensing of nondramatic performance rights to television networks, other broadcast users, and a wide variety of users making direct performances to the public (night clubs, skating rinks, etc.) is carried on collectively, without price competition, through the instrumentalities of ASCAP and BMI (Pet. A. 3a n.3).

Virtually all major music publishing corporations are members (through different subsidiaries) of both licensing organizations.* Since each writer is permitted to affiliate with only one, publishers need such dual memberships in order to attract writers of both camps.

As a condition of membership, each writer or publishing company must sign a standard (ASCAP or BMI) writer or publisher agreement. Under that agreement the member authorizes the organization to license all of his (its) musical compositions,** then existing or thereafter created, on the terms and conditions decided upon by the ASCAP or BMI Board (Pet. A. 26a-27a).

The total number of copyrighted musical compositions owned by current members and, therefore, the number of compositions in the ASCAP and BMI pools exceeds, respectively, three million and one million (Pet. A. 27a). The district court found that "[as] a practical matter virtually every domestic copyrighted composition . . . is in the repertory of ASCAP or BMI" (*id.*).

The only form of license that ASCAP and BMI affirmatively offer to users is a blanket license to the organization's entire pool (Pet. A. 6a-7a). (Under their respective consent decrees, each organization is also required, upon a broadcaster's request, to issue a blanket license under which the fee is paid on each program using

*It is a stipulated fact that "virtually all major ASCAP publishers own or are owned by corporations which are affiliates of BMI". Also, Edward Cramer, President of BMI, testified:

> "Most leading publishers have affiliation with both ASCAP and BMI: It is hard to think of one that doesn't have publishing interests in both camps." (Tr. 4282)

**Unless otherwise indicated, references to the licensing of music shall hereafter mean the licensing of nondramatic performance rights.



pooled music, rather than on an annual basis; but all commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held and now hold standard ASCAP and BMI blanket licenses (Pet. A. 7a n.9).)

The blanket licenses ASCAP and BMI offer television networks, including CBS, contain the following principal provisions:

> (a) The network receives the right to use the entire ASCAP (BMI) pool.
>
> (b) For that right, the network pays a flat fee or fixed percentage of its income, which fee does not vary in relation to the nature or quantity of the uses the network makes of ASCAP (BMI) music during the license term.
>
> (c) Moreover, that fee remains constant irrespective of any direct licenses obtained by the network or independent program production companies ("packagers") from ASCAP members—thus, for the network to obtain direct licenses would result in the network paying twice for the same rights. (Pet. A. 3a, 6a-7a)

All ASCAP and BMI revenues in excess of administrative expenses and deposits in certain funds are distributed to their members on essentially a per-use basis (Pet. A. 11a n.15). To determine the nature and frequency of uses for distribution purposes, ASCAP and BMI survey all network uses and sample the performances of other categories of users (Pet. A. 27a). ASCAP writers also have the option of receiving distributions under a four-fund plan, which has an effect of deferring part of their income and compensating them additionally for longevity of membership and the recognized status of their works (Pet. A. 11a n.15). Many BMI writers are given bonuses in addition to per-use distributions, as well as royalty guarantees.

**B. Prior Proceedings Relevant to These Petitions**

On January 20, 1972, the district court denied ASCAP's motion for summary judgment (337 F. Supp. 394), holding that there were material issues of fact to be tried with respect to whether ASCAP's activities, "which would otherwise be illegal *per se*" (*id.* at 400), could be justified on the ground that they were essential in order to permit the market (for the licensing of performance rights to television networks) to function.

By order dated June 12, 1972, the district court directed that the issues as to defendants' liability be tried separately from, and prior to, issues concerning the nature and extent of the relief to be granted herein.

After trial, the district court held, on the authority of single-seller tying and misuse decisions, that a nationwide combination of sellers (ASCAP or BMI) who market their product through a common-sales-agency device could not be found to have engaged in price-fixing, in the light of the sellers' "retained right" to deal directly at "negotiated price[s] for each license", unless it could be shown that they "compelled" their customers to accept the common-sales-agency fixed price (Pet. A. 114a-115a).

The court stated that it could find such "compulsion" to exist in this case only if CBS could prove that filling its music performance rights requirements by direct licensing (the so-called "bypass" of ASCAP and BMI) was "not a viable method" (Pet. A. 55a), in the sense that (a) publishers and writers would boycott CBS in the event it canceled its ASCAP and BMI blanket licenses, or (b) the transactional problems of direct licensing (given the present lack of direct-licensing facilities) were not surmountable in the absence of judicial relief (Pet. A. 46a-47a, 50a). The court found that CBS had not proven either proposition, and indicated that CBS would be unable to do so unless and until it attempted a bypass in lieu of accepting the common-sales-agency price, and "failed" in some measurable degree (Pet. A. 43a, 54a, 113a-114a).



The Court of Appeals reversed, holding that defendants fix prices in violation of Section 1 of the Sherman Act. The bases for that decision are reviewed below.

## SUMMARY OF ARGUMENT

Since petitioners' requests for *certiorari* all stem from the supposed "uniqueness" and invalidity of the Court of Appeals' price-fixing determination, the short answer to these petitions is that any other determination, under the precedents established by this Court, would have constituted plain error.

Involved here is nothing less than the delegation by all sellers, to a central Committee, of the authority to fix prices on their products. It presents as clear a case of illegality under Section 1 as could possibly be conceived. Past excuses of market-functioning necessity are no longer espoused by petitioners; in fact, they affirmatively argued below that no such necessity exists, and the district court so found.

There is no relationship, let alone conflict, between the Ninth Circuit decision in *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (that cooperative false advertising does not amount to a price-fixing offense) and the Second Circuit decision here (that collective selling at Committee-set prices is a *per se* violation). There is also no conflict in *result* between this decision and *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). Moreover, since the reasoning of *K-91* was self-evidently contradicted by its own findings of fact and subsequently discredited by the Solicitor General's brief on the *certiorari* petition, its conflict with the reasoning here is of no practical consequence, and it neither requires nor warrants resolution by this Court.

The only question of significance this case has ever presented concerns, not the illegality of defendants' con-

duct, which is flagrant, but the details of the remedy required to "effectively pry open to competition a market that has been closed by defendants' illegal restraints". *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947). Since that issue has not as yet been squarely presented to the lower courts, much less resolved, the matter is hardly ripe for review at this time.

## Argument

## POINT I

THE COURT OF APPEALS' DECISION THAT PETITIONERS FIX PRICES IS NOT ONLY CONSISTENT WITH, BUT MANDATED BY, PRIOR DECISIONS OF THIS COURT.

### A. Petitioners Fix Prices.

If music publishing corporations agreed among themselves to sell performance rights to television networks for $1,000-a-use, they would obviously be engaged in a garden-variety price-fixing conspiracy.

If the same publishers appointed a Committee to make sales at $1,000-a-use, that, too, would be price-fixing "beyond peradventure", as this Court held in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135 (1969).

Assume, then, that these publishers and their Committee noticed, after a period of years, that each television network was paying in the aggregate about $5 million a year (the sum of all those $1,000-a-use payments), and the Committee decided to change the system by charging each network an annual price of $5 million for unlimited uses (and to make distributions to its members at $1,000-a-use, or whatever). No one could sensibly claim that the publishers were not still fixing prices through their Committee.

The third example is, of course, the ASCAP and BMI system. It differs from the first two examples only in the fact that the publishers do not agree on a specific price to be charged the networks for each use but on a specific *formula*



for distributing a lump-sum price to themselves on a per-use basis. In neither case is the price determined by the dynamics of a free and open competitive market; it is determined by an agreement among otherwise competing sellers—and that, as the Court of Appeals held, is most assuredly a price-fixing agreement.*

The fact that a federal court is empowered by the 1950 ASCAP consent decree, *United States* v. *ASCAP* [1950-51] *Trade Cas.* (CCH) ¶ 62,595 (S.D.N.Y. 1950), to set a "reasonable" price for that consortium's package

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*As alternatively stated in Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L. J. 783, 793-94 (1978),

> "When a group of sellers vend their product through a joint sales agency at a single price, competition among the individual sellers ceases to exist. Market forces do not determine how much each seller is to receive for his product. Instead, the decision is made by the agent. ASCAP does not set the price for the licensing of single compositions as in simpler price-fixing schemes. But by offering a blanket license, it sets one price for all compositions, and price competition among members of ASCAP is eliminated as surely as if the rate for each performance were fixed at the outset. Copyright owners, much as patent owners, may not pool their properties in order to fix prices." (Footnotes omitted.)

We think it clear, by necessary implication, from *United States v. Loew's Inc.*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F. 2d 515 (8th Cir. 1949), that the price-fixing of performance rights to copyrighted music constitutes copyright misuse—as the Court of Appeals held here (Pet. A. 23a n.29). *See also Tempo Music Inc.* v. *Myers*, 407 F. 2d 503 (4th Cir. 1969). Petitioners challenge the existence of the copyright misuse doctrine, yet this Court's initial adoption of the patent misuse rule was predicated on the authority of the copyright misuse concept. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942). Furthermore, the distinction petitioners claim between the supposed "economic clout" of copyrights and patents (BMI Pet. 23) is wholly beside the point, even if such a sweeping generalization were factually valid. For the misuse concept derives, not from the degree of the "clout" inherent in the statutory monopoly (patent or copyright), but from the *extension* of that monopoly inherent in the antitrust offense.

More significantly, however, for purposes of these petitions, the question is of such little consequence to this case (since the price-fixing determination supports the relief sought) that it plainly fails to provide an independent basis for the issuance of a writ and should be re-aired, if at all, in a case in which it is central.

neither dislodges the price fix nor is particularly pertinent to this case.*

The Sherman Act, as the Court of Appeals observed, says nothing about "reasonable" prices (Pet. A. 11a-12a). It is "aimed at preserving free and unfettered competition as the rule of trade". *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). What it guarantees are prices determined by "the unrestrained interaction of competitive forces" (*id.*); what it therefore prohibits is any combinative practice "which prevents the determination of those prices by free competition alone". *United States* v. *Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150, 223 (1940).

Thus, whether otherwise competing sellers agree to sell at a price (a) set by an independent accounting firm authorized to hold hearings for the purpose, (b) established by a federal district court, or (c) pegged to the Dow-Jones Average (*e.g.*, 960 = $960-a-use), that price is still not determined by the dynamics of a competitive market—it is, therefore, noncompetitive and fixed.

All the court has the power to determine under the ASCAP decree is the price tag for the Committee's package—*i.e.*, how much each user will turn over to the consortium to be funneled back to the members through its distribution system. By so doing, the court by no means supplants—indeed, it implements—the members' price-fixing arrangement:

> "For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces." Pet. A. 18a.

*Nor is it even applicable to BMI, whose consent decree contains no rate-making provisions.



The fact that music publishers were given the "right" by the 1950 ASCAP consent decree to sell directly to their customers (*i.e.*, not through the ASCAP consortium) and to charge other than consortium prices similarly fails to remove the price fix (even apart from the historical fact that they have never exercised such a "right").* All members of all price-fixing conspiracies *always* have such "freedom" in view of the unenforceability of price-fixing agreements—and the case books are filled with successful price-fixing prosecutions, including criminal convictions, in which the conspirators (unlike those here) actually and frequently exercised that "freedom". *E.g., United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *Plymouth Dealers' Ass'n of Northern California v. United States*, 279 F.2d 128, 132 (9th Cir. 1960); *Ohio Valley Electric Corp. v. General Electric Co.*, 244 F. Supp. 914, 930-31 (S.D.N.Y. 1965).

*Nor, again, is such a "right" applicable to BMI, whose authority to license is exclusive. The BMI consent decree permits direct licensing of only "specified performances" made " directly to the public" (and upon written consent "of all writers and publishers" in interest). *United States v. BMI* [1966] *Trade Cas.* (CCH) ¶ 71,941, § IV (S.D.N.Y. 1966). If the phrase "directly to the public" were intended to include the electronic transmissions of telecasting equipment, there would have been no need for such a qualifying phrase, for in that event all performances would be deemed to be made "directly to the public".

The district court held that a stipulation concerning the "practicability" of directly licensing BMI music required an assumption for this case that BMI's rights were non-exclusive (Pet. A. 32a-33a). That ruling was erroneous, not only because it misconstrued the stipulation, but also because a stipulation of fact cannot alter a legal conclusion—*i.e.*, the exclusivity of the rights which BMI unquestionably obtains under its standard affiliation agreement. *Swift & Co. v. Hocking Valley Ry.*, 243 U.S. 281, 289 (1917). The ruling was also irrelevant to Section 1 (and therefore disregarded by the Court of Appeals), since the legality of price-fixing under the antitrust laws has never depended on the "exclusivity" or "nonexclusivity" with which prices have been fixed. In all events, whatever is said of ASCAP, applies, in reality, *a fortiori* to BMI, so we will generally refer hereafter only to ASCAP.

Plainly, such "freedom" does not somehow "unfix" the prices of Committee sales or otherwise make them competitive. As to those sales, price competition has not merely been restrained, it has been eliminated; and that is true whatever number of direct sales the participants in this combination might also transact. Indeed, that fact is dispositive of the liability question in this case. Hence, the Court of Appeals correctly held:

> ". . . [E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940)." Pet. A. 12a.*

Even looking beyond that fact, as petitioners urge, though it is unnecessary in law to do so, it is evident that there is even less basis for assuming here, than there would be in a garden-variety price-fixing case, that the "individually negotiated" prices (which petitioners profess their willingness to offer, ASCAP Pet. 3, 13) would be equivalent to competitive prices (which the Sherman Act guarantees).

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*ASCAP allegedly finds comfort in this Court's restatement of the principle in *National Society of Professional Engineers v. United States*, 98 S. Ct. 1355 (1978), that only "plainly anticompetitive" acts are illegal *per se*. Since the price-fixing committed by ASCAP and its members represents the most "plainly anticompetitive" act on the ledger of antitrust offenses, the restatement of principles most pertinent to the present case is contained in the following passage of that opinion:

> "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. . . . [Citations omitted.] That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason. . . ." 98 S. Ct. at 1364



In the first place, the very existence of a price-fixing arrangement "tends", as this Court noted in *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942), "to place a premium on the abandonment of competition"—a premium that buyers have to pay. Competitors do not conspire unless they recognize the value to themselves of entering into such agreements. To sell in a manner, or at a price, inconsistent with such an agreement threatens its viability and thus the loss of that value. Indeed, given such disincentive to compete where there exists only loose arrangements or understandings among sellers, tacit or express, consider the effect where the agreement consists of a highly structured consortium scheme that has insulated its members from price competition for nearly 65 years.

As the Court of Appeals observed:

> ". . . [T]he very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." Pet. A. 20a.

It "provides", the Court further stated, "a disinclination to compete" (Pet. A. 22a).

The ASCAP petitioners criticize what they term the "*ipse dixit*" of that conclusion (ASCAP Pet. 10); but their premise is confused. This is not a proposition which must be proven in order to show that competitors' agreements on price, arrived at in Committee, have an anticompetitive effect; it is an economically axiomatic point cited simply as further explanation why agreements of this nature are unlawful *per se*.

In *United States v. Masonite Corp.*, *supra*, the "right" of the colluding sellers to withdraw was recorded,

as it is here, on the face of the price-fixing agreement,* and the district court expressly found that the defendants

> "... were willing and intended to terminate their respective agency agreements whenever it should become commercially possible to offer a competitive non-infringing product." 316 U.S. at 281.

Precisely the proposition stated above was cited by this Court in explanation of why such a "right" and "intention" were irrelevant:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially,

*Since the agreement to fix prices was unenforceable, each competitor in reality had the right to withdraw at any time, although the termination provisions themselves required six months' notice. 316 U.S. at 272-73. In view of the Court's analysis of the case, a clause providing for immediate termination would have been no more material than the six-month termination provision; but it might be noted that the equally irrelevant "freedom" of the ASCAP publishers to withdraw could not be immediately effectuated either. For the district court here found that the creation of a direct licensing market, given the publishers' present lack of any direct-licensing facilities, would require "a long period of advance preparation" (Pet. A. 65a, 77a-78a).



> throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the result was or was not beneficient or whether the evil was or was not realized. As in case of an appraisal of the reasonableness of prices which are fixed, such a determination could satisfactorily be made 'only after a complete survey of our economic organization and a choice between rival philosophies' (*United States v. Trenton Potteries Co.*, *supra*, 273 U.S. at p. 398) and only after weighing a host of intangibles. *United States v. Socony-Vacuum Oil Co.*, *supra*. The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. . . ." *Id.* at 281-82.

In the second place, the prices at which Committee sales are made would be reference points that would inevitably stabilize any "individually negotiated" prices.

ASCAP distributes approximately $1,000 ($500 to the publisher or publishers; $500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses) (Pet. A. 11a n.15). From the standpoint of the copyright proprietors, their common-sales Committee, ASCAP, is effectively selling feature performance rights to television networks for $1,000 per use. So long as ASCAP continues to do so (at $1,000, $1,200, $800 or whatever that figure is) that fixed price and all the sales made at it would necessarily warp toward it, boost and stabilize prices in direct-licensing transactions. Any publisher from whom CBS were to solicit a direct-licensing price quotation would necessarily take into account the price at which he is selling to other networks through ASCAP and had been selling to CBS. It becomes a reference point or point of departure—*i.e.*, another determinant of price that does not arise from

competitive conditions, but is injected artificially into the market by an industry-wide sellers' agreement.*

*Plymouth Dealers' Ass'n of Northern California v. United States,* 279 F. 2d 128 (9th Cir. 1960), involved the stabilization effect inferred from the dealer association's circulation of a "list" price which was not even intended to be used as the dealers' actual sales prices (in fact, it was intentionally set high so as to give customers the impression of larger discounts off list). How much more obvious would that effect have been, and how plainly unlawful, had all automobile dealers in the country formed an industry-wide sales committee actually to make sales on behalf of its members at that list price.

*As observed in the Yale Note, *supra* at 793 n.64,

"It is difficult to conceive of circumstances under which the existence of an agreement to fix prices would not affect the price at which direct dealings would occur. In view of ASCAP's and BMI's domination of the market, the final price in any direct negotiation could hardly be the product of price competition, but would be influenced by the price fixed by ASCAP. *Cf.* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE at 164-73 (1970) (describing types of price leadership)."

This point, as was true of the first, involves a proposition of law, not a factual issue. But the record of this case is sufficiently copious actually to demonstrate, if not the magnitude of the effect, at least the inevitability of its occurrence. Among other concessions of this fact, Robert Nathan, ASCAP's own economic consultant on its distribution system and its economic expert witness at trial, testified:

"Q. Let's assume at this time the ASCAP distribution rate for feature music is $800 and lower fees for other categories.

"Do you think those fees would have any influence on prices arrived at, prices offered by publishers?

"A. Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television and you came to me, I think I would start putting numbers down and say, how much have I gotten in the past, try to figure out that average and think of something and then I think I would certainly use that as one of my factors in considering the bargaining price; one factor." (Tr. 4200-01)

BMI itself has again conceded the point in its very petition to this Court, where it states,

"To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . ." BMI Pet. 15.

The difference, of course, between a BMI price (which is contrived by a cartel) and "any other price in the market" (which is charged by an individual seller) is all the difference in the world.



And consider what this Court's reaction would be to an industry-wide consortium of steel manufacturers who announced that their "Committee" would henceforth make sales at agreed-upon list prices for the "convenience" of their customers but that any customer who wished to attempt to bargain directly could do so.

The fact is that one cannot thrust down in the middle of what would otherwise be a competitive market an elaborate nationwide sales consortium scheme participated in by all sellers and expect that market to remain competitive—*i.e.*, expect prices still to be determined by the "unrestrained interaction of competitive forces", *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), as required by the antitrust statutes.

Again, this impact need no more be proven when a price agreement is already afoot than the "premium" presumed in the *Masonite* decision; and it could not be measured even if direct licensing actually occurred. But it does not have to be assayed; the very problem of establishing such an impact empirically is one of the major reasons why arrangements of this nature are illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940). As stated by the court of appeals in *Plymouth Dealers'*,

> "The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action." 279 F.2d at 133.*

*The district court took no cognizance of this point or of the many striking judicial and testimonial admissions that reinforced it. Although the Court of Appeals stated, "On this record we are not convinced that this [stabilization effect] is necessarily so" (Pet. A. 22a n.27), it similarly did not refer to those admissions or to the precedent cited above, and advised the district court to fashion a remedy "which will ensure that the blanket license will not affect the price or negotiations for direct licenses" (Pet. A. 21a). We believe it clear, as stated above, that the point represents a legal conclusion, not an issue of fact, but, in any event, is icing on the cake to a holding of liability when otherwise competing sellers are already engaged in sales at Committee-set prices.

**B. Petitioners' Central Contentions**

As is true of their assertion that the possibility of "individually negotiated" prices is all the Sherman Act affords, all other reasons put forth by petitioners as to why they are not fixing prices simply reconfirm that they are.

1. Petitioners contend that the district court was correct in holding, on the authority of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), that sellers who price and market by Committee are not fixing prices unless they "coerce" their customers into purchasing from that Committee (ASCAP Pet. 14-15).

*Zenith*, however, was not a price-fixing suit; it condemned as patent misuse the insistence by a *single* owner of a group of patents that its licensees pay royalties on unpatented products. In that case, there would have been no abuse of patent leverage, and no anticompetitive effect, unless that single seller "coerced" licensees' acceptance of those terms or refused to license on any other basis.

Where, as here, copyrights are pooled by a multitude of otherwise competing sellers and licensed at prices fixed by their Committee, the combination achieves an anticompetitive effect regardless of any "coercion" exerted on the buyer to deal with the Committee; accordingly, as the Court of Appeals held, "coercion" is not an element of the offense (Pet. A. 17a).

To the ASCAP petitioners, that conclusion is anomalous, for, they say, they could convert themselves into a "single-seller" too by the simple expedient of "assigning their copyrights to ASCAP", and "surely", they contend, "it makes no sense, economic or legal, to penalize ASCAP's members" for not having done so (ASCAP Pet. 15).

What really "makes no sense" is that contention. If ASCAP acquired title to all of its members' 3,000,000 copyrights, it might not, arguably, be guilty of price-fixing under Section 1 of the Sherman Act when it licensed others to use those copyrights; but it would have committed a



blatant violation of Section 2 of the Sherman Act and, to the extent Section 7 of the Clayton Act applies to unincorporated associations, of that statute as well.*

2. *Amici* Copland, *et al.*, analogize ASCAP to a joint venture of music publishers and to a partnership of lawyers (Br. 11-15), whereas BMI prefers to be equated with a "wholesaler of eggs" (BMI Pet. 15). Precisely the same fallacy that undermines ASCAP's reliance on the single-seller cases (such as *Zenith*) shows the speciousness of these contentions.

If BMI were actually to acquire futures on all eggs now or hereafter to be produced in this country, it would doubtless be guilty of violating Sections 2 and 7; just as ASCAP would unquestionably violate Section 2, if it pooled titles to all its members' copyrights in a single joint venture, or engineered a partnership of all or most lawyers in the United States. When, on the other hand, publishers, law firms or any otherwise competing sellers authorize another entity to set prices on their behalf, the applicable offense is that prohibited by Section 1, whatever the legal form in which that entity is organized.

This is hardly an arbitrary or artificial distinction, as petitioners seem to imply; it is a distinction fundamental to the operation of the antitrust laws.**

3. The BMI petitioners advance the additional and curious contention that publishing corporations are not fixing prices through BMI because they have turned over the decision regarding prices to be charged to the BMI Board on which they are not represented and never themselves discuss or agree upon such prices.

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*By the same token, if all the banks in New York City were to merge, the resultant corporate entity would not be guilty of fixing interest rates on loans, but it would certainly be guilty of violating Sections 2 and 7.

**The failure to perceive it is also one of several major errors in reasoning discrediting the Harvard student work on which petitioners rely (Note, *The Middleman as Price Fixer*, 91 HARV. L. REV. 488 (1977)). Another is that collective licensing can be justified by transactional efficiencies—a notion dealt with below (at 22-23).

The basic misconception of this argument concerns what price-fixing is. Whether otherwise competing sellers have allowed the final decision regarding the prices to be charged to be made by a committee of the whole, a committee of elected representatives, a committee of independent third parties, or a totally external and arbitrary factor (*e.g.*, the temperature reading in Central Park), the arrangement constitutes price-fixing and is unlawful *per se* for exactly the same reason that any competitors' agreement regarding prices is unlawful *per se:* it prevents prices from being determined solely by "the unrestrained interaction of competitive forces" (*Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

As to both that point and the supposed "independence" with which BMI publishers delegate pricing authority to BMI, the following passage of the decision in *United States v. Masonite Corp.*, 316 U.S. 265, 275-76, (1942), applies *a fortiori:*

> "As this Court stated in the *Interstate Circuit* case (p. 227): 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' . . . Nor can the fact that Masonite alone fixed the prices, and that the other appellees never consulted with Masonite concerning them, make the combination any the less illegal. Prices are fixed when they are agreed upon. *United States v. Socony-Vacuum Oil Co., supra,* p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. . . ."



4. The BMI petitioners also cite *Standard Oil Co. (Indiana) v. United States,* 283 U.S. 163 (1931), *International Manufacturing Co. v. Landon, Inc.,* 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc. v. Landon, Inc.,* 379 U.S. 988 (1965), and related decisions in support of their assertion that the rule of reason governs "agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds" (BMI Pet. 19).

If either that proposition or the cases cited were of any utility to defendants on these petitions, one would have expected the ASCAP petitioners to have advanced the same point. They have not, and the reason is made evident by the very ground on which the Ninth Circuit in *Landon* both relied on the *Standard Oil* decision and distinguished that ruling from a case such as that presented here:

> "The pooling of the patents, licensing all patents in the pool collectively, and sharing royalties is not necessarily an antitrust violation. In a case involving blocking patents such an arrangement is the only reasonable method for making the invention available to the public. *Standard Oil Co. v. United States,* 283 U.S. 163, 170, 51 S. Ct. 421, 75 L. Ed. 926.
>
> "Appellants argue, however, that mandatory package licensing of all the patents in a pool constitutes patent misuse. Although there is no case precisely in point, appellants call our attention to *American Securit v. Shatterproof Glass Co.,* 3 Cir.,

268 F. 2d 769, in which it was held that mandatory package licensing of the patents in that case fell within the tying prohibitions of the anti-trust law.

> "*That case is different from the one before us in that it involved competing, rather than blocking, patents. In our opinion this distinction is an important one.*" 336 F.2d at 729. (Emphasis added.)

Thus, when A and B own blocking patents, A can neither use his patent without obtaining a license to B's, nor interest others in a license to use his patent without the authority to license others to use B's. B, of course, is in exactly the same boat. Hence, a market-functioning necessity exists for A and B to agree to allow each other to license the patents together; and that agreement is exempted by case law from the operation of Section 1, since it would otherwise be impossible to utilize or market those patents. Accordingly, the Ninth Circuit further held,

> "If we were to condemn mandatory package licensing of blocking patents as a patent misuse, an owner of a blocking patent complex would be compelled to license only a part of the patent complex. This would be true even though he knew full well that the licensee would be able to use the patents only by violating the remaining unlicensed patents." *Id.* at 730.

The concept of "blocking" or "interlocking" patents is, of course, entirely foreign to the copyright field. Thus, the market-functioning exemption afforded "blocking" patents has absolutely nothing to do with a pool of otherwise competing copyrights or, consequently, with these petitions.

5. Most certainly, no such exemption is invoked by the transactional efficiencies inherent in collective monitoring* and licensing; although this false notion permeates petitioners' submissions.

*I.e., the monitoring of users' performances for the purposes of auditing licensed uses and detecting infringements.



In the first place, monitoring can be performed collectively, and its cost savings fully achieved, in the absence of collective licensing. There is, indeed, no reason whatever why publishers who monitor together (through ASCAP or any organization formed for the purpose) must therefore also license together (through that organization or otherwise), and petitioners have not even argued, let alone offered proof, that those two functions are mutually dependent.

In the second place, collective licensing and the suppression of competition that goes with it are not justified in law by transactional efficiencies. *United States v. Line Material Co.*, 333 U.S. 287, 309-10 (1948); *see also, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 610-12 (1972); *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). The transactional costs of selling and shopping reduced by such a system are precisely the sort normally incurred in a competitive market. If the cartelization of music publishing corporations were deemed warranted by such "efficiencies", we must also permit all-industry sales Committees for the otherwise competing producers of movies and books, or, for that matter, automobiles and steel, for such consortia could doubtless point to equivalent or even greater transactional savings.*

*It should be noted in this connection that the Yale Note premises its call for a legislative solution on two erroneous assumptions of fact.

The first erroneous assumption is that direct licensing by networks will substantially increase the cost of "monitoring performances" (87 YALE L. J. at 801). Since ASCAP's and BMI's present monitoring of television networks now consists of complete audits of every single network use—*i.e.*, the maximum amount of monitoring anyone could want—there should not, by definition, be any increase whatever.

The second error, inherent in the supposed desirability of saving the transactional costs of direct licensing itself, derives from the author's failure to make two important distinctions: (a) between the start-up costs of direct licensing, which will be appreciable (*e.g.*, publishers' hiring and training of personnel and contacting writers to obtain their consents to direct licensing, *see* Pet. A. 9a-10a) but hardly inordinate, and the continuing transactional expenses (which cannot be any greater per-transaction than those now incurred in the licensing of performance rights to movie companies); and (b) between such continuing transactional expenses and those normally incurred in a competitive market (which there is no reason to believe would be any lower at all, let alone so much lower as to warrant the legislative proposal made in the Note).

*Amici* Copland, *et al.*, seem to suggest that joint licensing is justified, not merely by transactional efficiencies, but by the inability of the market to function without it (Br. 13). Prior to this suit, that was, in fact, the ASCAP party line. Thus, ASCAP's general counsel for more than 40 years, Herman Finkelstein, testified before a special committee of the Judiciary Committee of the House of Representatives in 1956:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." *Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 84th Cong., 2d Sess., Pt. 2, Vol. 2, 4471 (1956) (Statement of Herman Finkelstein).

That, too, was the sole ground on which the Solicitor General supported the "result" (not the reasoning) in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968)—a case in which the radio broadcaster counter-claimant had stipulated to the facts underlying ASCAP's market-functioning-necessity defense.* And that was also the basis on which both groups of defendants initially sought to defend this suit (*see, e.g.* 337 F. Supp. at 401 n.4).

But whatever the validity of that concept as a matter of law, and whatever its relevance to the licensing of radio stations and restaurants, petitioners conceded at trial, the district court found, and the Court of Appeals agreed that

*The stipulation is quoted in the district court's opinion on ASCAP's motion for summary judgment (337 F. Supp. at 400).



it had no application whatever to the licensing of television networks (Pet. A. 16a). Indeed, petitioners affirmatively asserted the *lack* of market-functioning necessity because the facts necessary to support such a contention—

> that the market for the licensing of television networks could not function at all on a direct-licensing basis,

are totally inconsistent with the facts that petitioners desired to prove in order to buttress their (legally nonexistent) bypass defense—

> that that market would function so well on a direct-licensing basis that CBS could fill its requirements, without disadvantage, by bypassing both common-licensing agencies.

There is no longer, therefore, the slightest question but that this market can feasibly be made as competitive as those involving the licensing of mechanical, sheet-music and motion picture performance rights if only the present cartel apparatus were removed.*

6. Having dropped their own claim of market-functioning necessity, petitioners now criticize the Court of Appeals' dictum regarding the possible appropriateness of such a rule in the rare case of genuine and absolute necessity.

*CBS not only agreed at trial that the market for the licensing of performance rights of television networks would function perfectly well in the absence of collective licensing, it adduced considerable evidence to reinforce that proposition. On the other hand, CBS also maintained, and, we believe, overwhelmingly established, that:

(a) significant barriers to direct licensing are now in place, consisting of:

(i) the strong incentive publishers have *not* to expend their own efforts and funds for the creation of sufficient direct-licensing facilities to enable a television network to bypass, and thereby threaten the viability of, the very cartel system that provides them with noncompetitive royalties and spares them transactional expense;

(ii) the premiums that any bypassing network would have to pay for "music-in-the-can" (*i.e.*, all copyrighted music already recorded in all theatrical motion pictures and television programs in existence); and

Such a case might well be presented by some fields of collective licensing, as the Solicitor General maintained in *K-91*. And it is difficult to explain the decisions in *United States v. St. Louis Terminal Association*, 224 U.S. 383 (1912), *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), *Associated Press v. United States*, 326 U.S. 1 (1945), or the blocking-patent cases without resort to a market-functioning rationale.

In a case whose outcome depends on a resolution of that question, the grant of *certiorari* might be provident. But given the district court's finding here and petitioners'

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(iii) the sanctions that ASCAP imposes on users and members alike for engaging in direct-licensing transactions (*e.g.*, withholding the services of monitoring and reporting on network uses); *but*

(b) those barriers are entirely artificial, cartel-created obstacles readily removable by decree—*viz.*:

(i) as is true of all sellers in competitive markets, and true of these same music publishers in other fields, the publishers would create facilities for dealing directly with customers, once dealing by cartel were enjoined, since there would be no other way to do business;

(ii) the music-in-the-can problem could be alleviated by a per-use system (*see* p. 39-40 *infra*) or eliminated entirely by the forfeiture solution adopted in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 900, 904-05 (S.D.N.Y. 1948) (two opinions), and the 1950 ASCAP consent decree, *U.S. v. ASCAP* [1950-51] Trade Cas. (CCH) ¶ 62,595, § IV(F) (S.D.N.Y. 1950); and

(iii) whether the publishers authorized ASCAP and BMI to continue collective monitoring of networks, or financed some new organization for that purpose out of their direct-licensing royalties, that function would be performed, if it were deemed desirable by the publishers to continue it.

Those propositions were pertinent to CBS's additional claims of monopolization, tying and *Zenith* misuse; and though legally superfluous to the central price-fixing averment, were erroneously put in issue on that claim by the trial court's pre-trial order.

We note these points only because of the apparent confusion below that CBS, by offering evidence of barriers to direct licensing, was somehow trying to prove the market-functioning-necessity case that defendants had abandoned. The source of that confusion was the district court's failure to perceive the distinction between (a) natural or inherent barriers to direct licensing (which, if they existed, would arguably support a market-functioning-necessity defense), and (b) artificial barriers removable by decree (which obviously support the need for the issuance of such an order). It was the latter that we established; the nonexistence of the former was agreed to by all parties to the case.



own concession as to the prospective functioning of the market on a direct-licensing basis, this is plainly not such a case.

7. The BMI petitioners imply that the Solicitor General's approval of the *K-91 result* extended to the Ninth Circuit's conclusion "that ASCAP's offer of a blanket license was not price fixing" (BMI Pet. 13).

In point of fact, the Solicitor General indicated quite clearly that, absent the market-functioning necessity which had been stipulated to in that case, the common-selling agency device operated by ASCAP would be illegal *per se*:

> "Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting." (Memorandum for the United States as *Amicus Curiae* at 7-8)
>
> "If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. . . .
>
> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson v. Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. . . ." (*Id.* at 13)

8. *Amici* Copland, *et al.*, further contend that if the market cannot function on a direct-licensing basis for

users other than networks, then collective licensing must be permitted for those networks, for otherwise they would be given "preferred" treatment which "the law does not require" (Br. 14).

What the law requires, obviously, is that colluding sellers be made to compete—whether their collusion is directed at a single buyer, a single class of buyers or all buyers to whom they sell. If any treatment can be deemed "preferred" or special under the antitrust statutes, it is that only arguably accorded, and certainly strictly confined, to the minimum extent of collusive activity which is absolutely essential for market-functioning purposes. To expand that treatment so as to leave noncompetitive any marketplace that could otherwise *be* competitive would stand the Sherman Act on its head.

9. BMI claims that the blanket-licensing system, even if price-fixing, should be accorded rule-of-reason treatment because both ASCAP and BMI are required by their decrees to issue blanket licenses on users' requests.

Of course, given the policy stated by the Solicitor General's brief in *K-91*, both ASCAP and BMI could immediately relieve themselves of that "requirement" *vis-a-vis* any category of user for which they conceded the loss of their market-functioning excuse.

But the more fundamental answer is this: CBS was not a party to the agreements underlying those decrees, nor a party to the actions in which they were entered. And there is no more reason why a private claimant should be precluded from asserting a *per se* rule because of a consent decree to which he was not a party than there is any reason why a private claimant should be precluded by such a decree from bringing suit. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *United States v. Columbia Artists Management Inc.*, [1963] Trade Cas. (CCH) ¶ 70,955 (S.D.N.Y. 1963), *aff'd per curiam* 381 U.S. 348 (1965); *United States v. ASCAP (Shenandoah Valley Broadcasting Inc.)*, 331 F.2d 117 (2d. Cir.), *cert. denied*, 377 U.S. 997 (1964).



BMI invites analogy to *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), which involved a statute, not a consent decree. While the former is obviously binding on all citizens, the latter is, just as obviously, not.

10. ASCAP complains that "the Second Circuit's ruling casts a shadow over every common selling agency which establishes package prices" (ASCAP Pet. 16). Well it should, since it is difficult to imagine how any such arrangement could be lawful.

ASCAP asserts that CBS is itself a "common selling agent of advertising time" for the stations affiliated with its network, and "a common buying agent of programs for performance on those stations" (ASCAP Pet. 16). If those charges were true, and if there were actually some evidence in the record to support them, they would be patently irrelevant to the only issue involved in these petitions —whether *ASCAP and BMI* are price-fixing combinations. Nevertheless, they are neither evidenced nor accurate.

CBS buys programs and sells advertising for its own account. Not only does CBS *not* act as a common-sales agent of advertising, it is prohibited by FCC regulation from so acting (47 C.F.R. § 73.658). And CBS is no more a common-buying agent of programs for the account of its affiliated stations than Doubleday is a common-buying agent of manuscripts for the account of book stores throughout the United States.

11. ASCAP's final thrust is essentially the contention that CBS has too much bargaining power to permit it to deal directly with individual composers who may not "behave like economic man in negotiating prices for the performance of their music" (ASCAP Pet. 22)—a theme that pervades much of the district court's opinion.

The fact is that writers of music *now* relinquish the commercial exploitation of their works and the negotiation of prices (in the mechanical, sheet music and motion

picture fields) to music publishing corporations whose existence, function and size are not alluded to in petitioners' papers.

Apart from that elision, the point here seems to be that because CBS is a big company it must be excluded from the protection of the antitrust laws—made to deal in a jungle. But can it seriously be said that all CBS's suppliers are entitled to gang up on CBS so that in combination they are as large or larger? Such a rule would make a shambles of the antitrust laws; and it is plainly an untenable contention.

In point of fact, most major music publishing corporations belong to conglomerate families—many as large or larger than CBS. We have, for example, Warner Communications, Gulf & Western, MCA, Transamerica, Disney, Twentieth Century-Fox, Polydor (a Dutch conglomerate which controls Chappel Music, one of the ASCAP giants) and EMI, (an English conglomerate, which owns Capitol Records and Screen Gems). Even the independents, such as Shapiro, Bernstein, Morris, Schirmer and Gershwin have vast catalogs containing thousands of show tunes and movie compositions—*i.e.*, the "standard" works so vital to music programming.

Moreover, CBS, because it produces few of its own programs, will rarely be dealing with music publishing corporations at all. The universal practice in the television and movie industries is direct licensing (between the producer of the program or film and the supplier of rights), music performance rights for television programs being the sole exception. Hence, as a result of this case, packagers will negotiate direct licenses to music performance rights in the same manner they now negotiate with other suppliers for all other program elements.

The only available proof regarding the price levels of direct-licensing transactions comes from the movie rights field—and those prices are exceedingly high (ranging from approximately $800 to $15,000 per song). The movie companies that buy those rights have at least as much



bargaining power as the television producers who will buy the performance rights for network television programs. Indeed, they are precisely the same companies.*

## POINT II

NO CONFLICT AMONG THE CIRCUITS WARRANTS THE GRANT OF *CERTIORARI* IN THIS CASE.

### A. K-91

*K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied* 389 U.S. 1045 (1968), was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the state of Washington. The broadcaster defended by asserting that ASCAP's price-fixing and commission of other antitrust violations constituted copyright misuse, as did ASCAP's failure to comply with a Washington statute

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*In a similarly unfounded attempt to arouse emotional appeal for its position, ASCAP suggests that CBS seeks to pay nothing to ASCAP members for music used since March 31, 1978 (ASCAP Pet. 11n). The contrary is true and ASCAP has good reason to know that.

It has been CBS's announced position from the outset of this suit that it wishes to pay for the music it uses, but on a basis different from the extortive system under which performance rights are now purveyed. For that reason, this suit was brought solely for injunctive and declaratory relief. Following the Court of Appeals adjudication, CBS exercised the right, expressly reserved in 1970 with ASCAP's consent, to terminate the interim blanket license which CBS had accepted only under protest. At the same time, CBS stated its willingness (despite the lack of any legal entitlement in ASCAP) to commit to pay in respect of this period on the same terms that the court imposes in its final decree, and even to make payments on account pending the completion of the relief stage of the case. ASCAP rejected that proposal, insisting that CBS continue payments on the pre-existing terms (derived from the very system declared to be illegal) or risk infringement litigation in the event *certiorari* were granted and the Court of Appeals reversed.

We have no quarrel (here pertinent) with ASCAP's apparent attempt to have it both ways (*viz.*, to expect a voluntary CBS payment in the event of a denial of *certiorari* or an affirmance, while preserving its option of bringing an infringement suit in the event of a reversal); but ASCAP's attempt, in the light of these facts, to cast CBS as the party seeking unfair advantage is both disingenuous and ironic.

requiring it to issue per-piece licenses and file a schedule of per-piece rates. The broadcaster also counterclaimed for treble damages and injunctive relief.

The trial court, in an unreported decision, held the copyrights infringed and the defenses and counterclaims insufficient. The Ninth Circuit affirmed.

If there is a market-functioning exception to the rule condemning price-fixing as illegal *per se,* that affirmance was mandated by the parties' stipulation to the following effect:

> "It would be commercially, practicably and virtually impossible for plaintiffs and other composers, authors and publishers to issue a separate license for each performance broadcast over broadcasting stations or to have their payment for such performances on the basis of each individual use." (Quoted in the district court's decision denying ASCAP summary judgment in this action, 337 F. Supp. at 400.)*

It was, indeed, on that ground that the district court (in its summary judgment opinion) distinguished the result in *K-91* from that indicated in the present case:

> "Thus, the parties in *K-91* agreed that no practical alternatives were available to per program and blanket licensing, and none was proposed—which is, of course, the antithesis of CBS' position, and which removed from issue in the *K-91* case the very issue here presented. . . ." *Id.* at 400.**

*The parties also stipulated that:

"It would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations. . . ." 337 F. Supp. at 400.

**It is helpful to an understanding of the present case to appreciate the extent to which the district court reversed direction following its summary judgment decision. There, after quoting with approval the Solicitor General's discussion of a market-functioning exception to the *per se* rule as the basis for the present consent decree regulatory



And on that ground, which was adopted by the Court of Appeals and is consonant with the Solicitor General's analysis, there is no conflict in *result* between *K-91* and the decision here.

While there is certainly a conflict in the reasoning of the two decisions, it should not rise to the level of this Court's concern. Surely, not all conflicts do (*e.g.*, the Ninth Circuit rule on "attempt to monopolize", recently highlighted in *Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied* 98 S. Ct. 782 (1978),

system (as opposed to an injunction dismantling the ASCAP combination), and concluding that anticompetitive restraints could be tolerated only to the minimum extent necessary to serve "the purpose of maintaining an orderly market", the court held:

> "if CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.*, permit competition to occur and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary'." *Id.*

There was notably absent from that decision any framing of an issue as to whether the publishers' "retained right" of direct licensing could be resorted to, or whether, if it could, it meant that the ASCAP combination was somehow not fixing prices. On the contrary, the court branded ASCAP's activities as "price fixing" which would "be illegal *per se*" but for the possibility of a market-functioning necessity *(id.)* and mentioned, in passing:

> ". . . we are doubtful *in any event* of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.' " *Id.* at 401.

**By the time of the final opinion, however, the "key factual issue in the case" had become whether ASCAP's rights were effectively "exclusive" (in the sense of whether a bypass was impossible or would result in a boycott of CBS); neither Mr. Finkelstein nor any of his voluminous testimony admitting that point was ever mentioned; and while the court itself held on summary judgment that the critical issue was whether "the regulatory system can be amended to operate on a more competitive basis", it then stated, in its final opinion, that**

> **"CBS *now* takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis." Pet. A. 39a. (Emphasis added.)**

which conflicts with the rule applied by every other circuit court of appeals in the country). At minimum, they should be of the sort that generates uncertainties having a widespread and significant effect on important areas of conduct.

Here, for at least three reasons, there can be no such effect.

*First*, the *K-91* reasoning is not simply wrong; it is self-evidently absurd. Despite the stipulation and undisturbed finding in that case that direct licensing "was virtually impossible", the court held that ASCAP does not fix prices because its members' rights to engage in direct licensing "are fully preserved" (372 F.2d at 4). Despite the fact that ASCAP members fix prices before contact with a user is made and certainly before the matter is brought to the federal court, the Ninth Circuit reasoned that the federal court, not ASCAP, is the "price-fixing authority" (*id.*). And despite this Court's repeated holdings that the reasonableness of collusive prices is irrelevant to the price-fixing offense, the Ninth Circuit held that the blanket license was protected by the presumptive reasonableness of available judicial price determinations (*id.*).

No one, we submit, could sensibly rely on the continued adoption of such reasoning.

*Second*, whatever tenuous optimism any publisher might have had regarding the viability of that reasoning prior to the *certiorari* petition, it should not realistically have survived the filing of the Solicitor General's brief. In that, the Department of Justice gave explicit warning that price-fixing by ASCAP would not be tolerated without a continuing market-functioning-necessity excuse. Since the Court of Appeals' decision in the present case is exactly to the same effect, it cannot disturb any rational reliance on the outcome of *K-91*.

*Third*, *K-91* concerned the licensing of one segment of the copyright bundle of rights (nondramatic performing



rights) to one class of users (radio stations); and this case concerns the same segment and a second user class. The ruling reached here is in complete conformity with all price-fixing decisions since *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The only conduct it should disturb is conduct which is patently illegal and occurs in that narrow field. Indeed, the only way in which this case could have widespread adverse repercussions would be if the Second Circuit decision were reversed.

For a reversal here would effectively state to every industry in this country: although you cannot band together to fix prices in the traditional way, you can band together to form an industry-wide sales committee and do it that way; in fact, you will find it to be more effective.

**B. Cook Paint**

Petitioners support their claim of conflict between *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), and the Second Circuit decision in this case entirely on the supposition that otherwise competing sellers who market at prices set by committee are somehow not responsible for fixing the prices at which their committee sells.

Since that supposition is pretense, there is no relationship whatever, let alone conflict, between the *Cook Paint* decision that cooperative false advertising does not amount to a price-fixing offense and the decision here that collective selling at committee-set prices is a *per se* violation.

Quite recently in *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D.N.Y. 1978), a dealer-manufacturer list price gimmick, functionally equivalent to the circulation of list prices in *Plymouth Dealers' Ass'n. of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), was distinguished from *Cook Paint*, and held actionable

under Section 1, on grounds and on precedent (*Plymouth Dealers'* and *Socony-Vacuum*) that apply here *a fortiori.* For we are not dealing in this case with an agreement that is one step removed from an agreement on selling prices (as in *Socony-Vacuum* and *Plymouth Dealers'*); and we are certainly not dealing here with a category of consumer fraud whose influence on price, if any, is peripheral and indirect and whose commission, addressable by other laws, has not been conceived by any court to be within the purview of antitrust statutes.

We are dealing with an express, written agreement for the creation of a price-fixing mechanism as blatant and pervasive as any ever conceived. To say, as do petitioners, that this decision, holding that combination guilty of tampering with price, would convert consumer fraud into price-fixing on the same analysis is studiously to misread the opinion.

## POINT III

THE COURT OF APPEALS' GUIDELINES FOR RELIEF PROPOSE A PER-USE METHOD OF LICENSING* WHICH IS (1) FAR LESS RESTRICTIVE THAN THE PRESENT SYSTEM, (2) CONSISTENT WITH THE COURT'S HOLDING ON LIABILITY, AND (3) NOT, IN ANY EVENT, A FINAL REMEDY THAT WARRANTS REVIEW.

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*The basic elements of the per-use system proposed by CBS as one alternative form of relief are as follows:

(a) CBS would be freed of the obligation to pay ASCAP or BMI for the use of compositions which had been licensed directly from copyright proprietors.

(b) The licenses issued by ASCAP and BMI to CBS would cover that portion of the ASCAP and BMI pools which CBS had designated.

(c) CBS would pay ASCAP or BMI a specified fee for each use of ASCAP or BMI music covered by that license and not licensed directly.

(d) The fee for each use would be paid in accordance with a schedule of fees providing for different payments depending upon the nature of the use (*e.g.*, feature, theme or background).



### A. Petitioners' Contentions and Admissions

What has been throughout this case a dead give-away of the baselessness of defendants' contentions that they are not fixing prices has been their further contention that the per-use system (now tentatively approved by the Court of Appeals) would represent a "classic" case of price-fixing,* despite the real freedom of publishers to license

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(e) If the fee schedules could not be agreed upon by negotiations between the parties, they would be set by the court. Those schedules would be adjusted at periodic intervals, either by negotiation or by the court, to reflect prices arrived at in the market.

(f) In addition to the per-use fee payments, provision would be made for payments by CBS to ASCAP and BMI for the expense of administering the per-use licenses.

(g) Each ASCAP and BMI publisher would have the right to cancel ASCAP's or BMI's authorization to license CBS under the per-use license with respect to any or all of the compositions of which it is the copyright proprietor, and with respect to any or all of the uses which might be made of such compositions. That cancelation right could be exercised on reasonable notice or at periodic intervals (*e.g.*, quarterly). The cancelation would not be operative, however, with respect to music-in-the-can or the use of any music taped or filmed prior to the cancelation (and thus in reliance on an ASCAP or BMI license) even though the tape or film was broadcast subsequently). Such subsequent broadcast would, of course, be subject to payment of the fee specified in the per-use schedule. The cancelation could be revoked by a copyright proprietor at any time, thus restoring previously withdrawn music to the coverage of the per-use license.

(In the light of that withdrawal right, defendants' persistent contention that the per-use system would create a "ceiling" on direct-licensing prices is plainly wrong. Any music publishing corporation that desires to license any particular compositions at prices exceeding the per-use rate need only withdraw that composition from the per-use license. Obviously, the per-use rate could not be a "ceiling" for a composition to which the license does not apply.)

(h) New music would be added to the coverage of the per-use license as it entered the performed works index of ASCAP or BMI so long as the copyright proprietor had not exercised his cancelation right as to the composition.

*As BMI put it in its post-trial brief (at 120) and similarly argued in its brief to the Court of Appeals (at 10); or as ASCAP asserted below,

> "[W]e contend, in fact, that a per-use license would itself be a price-fixing scheme and a violation of the antitrust laws." (ASCAP's Memorandum Re Proposed Order on Rule 42(b) Motion, dated May 5, 1972 at 6).

*(footnote continued on next page)*

directly in such a system and despite the lack of "coercion".

Of course that is true, and for precisely the same reasons that the present system is price-fixing regardless of whether "coercion" is imposed. Not only would the per-use fees at which ASCAP and BMI would continue to license represent fixed prices but, as we emphasized to the courts below, those rates would inevitably boost and stabilize direct-licensing prices.

For defendants to have conceded, however, that they would be fixing prices in a per-use system is certainly to have conceded that they are now fixing prices.* On the other hand, in the unusual circumstances of this case, the per-use remedy provides a sensible and efficacious form of relief (even if it is not our preferred alternative).

Fully to appreciate that fact requires at least a brief description of alternatives.

### B. Per-Use Licensing Compared to the Present System and to Its Complete Abolition

The most obvious alternative would be a straight injunction against defendants' continuing to fix prices through ASCAP and BMI or otherwise in their licensing of television networks (which would effectively oust ASCAP and BMI from the market, since neither can continue selling without fixing prices). But the following factors must be taken into account in considering that approach:

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Petitioners and *amici* now try to hedge their bets by stating only that per-use licensing is price-fixing "if" blanket licensing is price-fixing (ASCAP Pet. 11-12; BMI Pet. 24 n. 20; Copland Br. 15-16).

*Equally, ASCAP's admission of the price-stabilization effect of per-use prices is an admission of how the present per-use distribution rates to its own members would stabilize prices in the event direct licensing were to occur in a bypass attempt:

> "The fact is, however, that the per-use rates to be set by the court would inevitably become the focal point around which any direct licensing transactions would take place. . . ." (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License", dated May 24, 1973 at 2)



1. Since performance rights have been licensed collectively since ASCAP's creation in 1914 (except for the direct licensing of motion picture production companies spurred by the decision in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions)), there do not, as the district court found, presently exist adequate marketing facilities for the direct licensing of published music to television networks, so that all network needs could not be obtained by direct licensing "without a long period of advance preparation" (Pet. A. 63a-67a, 77a-78a). Indeed, the parties stipulated that publishers do not even have the " 'facilities or procedures' for processing [such] requests" (Pet. A. 61a). Hence, the effective date of the straight injunctive remedy would have to be deferred for a period sufficient to permit such facilities to be created.

2. Although the district court predicted that the publishers' music-in-the-can leverage *(see* note at 25-26, *supra)* would not be imposed to the extent of concerted "holdups" (Pet. A. 102a-105a), there cannot be any rational dispute that networks, lacking licenses to such music, would have to pay substantial premiums in excess of competitive prices in order to use the films and programs in which such music was recorded. The economists for both sides agreed; BMI's trial memorandum affirmatively asserted that the situation in the aggregate would be "intolerable" for a network (BMI Trial Memorandum at 36); and, really, the point is so self-evident economically that judicial notice of it may be taken as it was in *Alden-Rochelle, supra*, 80 F. Supp. at 904-05.

There are two possible solutions. In *Alden-Rochelle,* the court, noting the movie producers' position that a bare injunction against ASCAP's licensing of movie theaters would place the pro-

ducers "in an obviously impossible bargaining position" with respect to music-in-the-can, enjoined ASCAP and its members from ever enforcing their copyrights as to such performances (80 F. Supp. at 904-05)—*i.e.*, an effective forfeiture of those rights. The alternative is to have music-in-the-can licensed by ASCAP and BMI on a per-use basis.

3. If the latter alternative were adopted with respect to music-in-the-can, the per-use rates the court set for those uses would clearly have the same price-stabilization effect as the present system or the full per-use system. But the blunt fact is: the same would be true for a period of time if the straight injunctive remedy were adopted with the *Alden-Rochelle* solution for music-in-the-can—for there is simply no way to erase the historical fact that ASCAP (from the members' perspective) has been selling performance rights to television networks for approximately $1,000-a-use.

In short, the methods for removing the anticompetitive effects ingrained by cartels of long-standing duration and national scope are not nearly as readily discerned as the illegality of those systems.

In contrast, these points regarding the per-use remedy should be noted:

1. One clear advantage it has over the straight injunctive remedy is that it may be made immediately effective. Whatever performance rights were not initially obtainable directly from publishers (given their present lack of personnel and facilities to negotiate and handle direct-licensing transactions), would be available from the ASCAP and BMI pools at per-use rates.

2. Per-use licensing is far less restrictive than blanket licensing*. Under the latter system, no direct licensing at all can realistically occur since no blanket licensee needs two licenses (blanket and direct), requiring two payments, for the same music. In a per-use system, on the other hand, a network user can immediately commence direct licensing for some portion of its requirements (without paying twice for that privilege). Though the existence of per-use rates would stabilize direct-licensing prices, there would nevertheless be, even at the outset, some considerable price competition among copyrighted compositions, since each would be *separately* priced.

*And, it might be noted, contrary to the assumption of the Harvard Note (91 HARV. L. REV. at 494), it would not be appreciably more expensive to administer than the present system. Uncontested evidence at trial showed that the start-up cost for ASCAP would be $9,500; for BMI, $22,000; and for both, continuing incremental costs of a few hundred dollars a calendar quarter. The reason is obvious: since ASCAP and BMI have computer capability to distribute revenues on a per-use basis to their members, the extra computer programming required to convert per-use distribution statements into per-use bills would be trivial.



As noted above, the stabilization effect of the present ASCAP rates would persist for some period after the entry of a straight injunction. Since per-use rates could initially be set (and periodically adjusted) more nearly to reflect competitive market price equilibrium levels, per-use relief could, in this sense also, more quickly remedy past anticompetitive effects.

3. Given the actual occurrence of direct-licensing transactions, and given the realization by publishers (driven home by the very result in this case) that direct licensing was here to stay, sufficient incentive would, at long last, exist for those companies actually to create direct licensing facilities, which would itself enable the networks to obtain an increasing portion of their requirements by this means. That development should, in turn, prompt ASCAP's and BMI's withdrawal from the market,

in the same fashion that ASCAP ultimately withdrew from the movie rights field after the *Alden-Rochelle* decision prohibited ASCAP from licensing theaters and led to movie producers' licensing directly from publishers.* Indeed, if ASCAP and BMI did not withdraw at that time, the court, under retained jurisdiction, could fashion whatever further relief was then indicated.

In terms of overcoming the "disinclination" factor noted by the Court of Appeals (publishers' resistance to direct licensing stemming from their preference for blanket licensing), the per-use and the straight injunctive remedies would have equivalent effect. Since in either event the networks would not have blanket licenses and, given the holding here, could not realistically be expected to return to that system, the loss of that system to publishers would have already occurred; it could not, in the Court of Appeals' words, continue to "dull [their] incentive to compete".

In sum, the imposition of a per-use system would immediately and "effectively pry open" to some considerable measure of "competition a market that has been closed by defendants' illegal restraints";** provide a continuing, transitional means for licensing compositions separately until entirely adequate direct-licensing facilities could be installed; spur the creation of those facilities; and thus, on the whole, afford sensible interim relief until the market could be made fully competitive. While the Court of Appeals did not articulate all those reasons for the guidelines it issued to the district court, the points are evident and the result, sound.

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*According to the Yale Note, *supra* at 801 n.104, "The projected process would be a classic example of market forces acting to break down cartel discipline [citing G. STIGLER, THE ORGANIZATION OF INDUSTRY 42-45 n.68 (1968)]".

**_International Salt Co. v. United States_, 332 U.S. 392, 401 (1947).



More importantly, however, for present purposes the Circuit Court's guidance to the court below does not present an issue worthy of *certiorari*. The adoption of a per-use system would have no application to other industries; it is *sui generis* to this case. Also, given the bifurcated nature of the suit, the issue of relief has not yet been squarely presented to either the district court or the Court of Appeals, let alone fully resolved. There obviously remains a trial on relief and, quite possibly, a subsequent Court of Appeals' determination, so that this matter is hardly ripe for present review.

What is clear (and, indeed, effectively conceded) is that defendants fix prices; the precise details of remedying that restraint should be left to the normal lower court processes.

## CONCLUSION

For the foregoing reasons, these petitions for writs of *certiorari* should be denied.

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Respectfully submitted,

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